

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERVINE LEE DAVENPORT,

Defendant-Appellant.

UNPUBLISHED

August 5, 2010

No. 287767

Kalamazoo Circuit Court

LC No. 2007-000165-FC

Before: STEPHENS, P.J., and GLEICHER and M.J. KELLY, JJ.

GLEICHER, J. (*concurring*).

I concur in the result reached by the majority, but write separately to elaborate my view of the manner in which the unfounded shackling of defendant during trial, and defense counsel's failure to object to the shackling, qualify as harmless errors.

Explicitly clear due process principles prohibit routine shackling of criminal defendants. "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). More than a decade before the United States Supreme Court decided *Deck*, the Michigan Supreme Court declared, "The rule is well-established in this and other jurisdictions that a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994) (footnote omitted).

The record in this case reveals that the trial court shackled defendant pursuant to a "policy." On the first day of trial, outside the jury's presence, defense counsel stated:

The other thing is I understand the Court's policy regarding the shackles. However, it's important that [defendant] and I have an opportunity to communicate back and forth, and generally we use a . . . method where he would write notes back and forth. I would ask that any handcuffs during trial be removed prior to the jury entering, giving us an opportunity to write back and forth freely.

No record findings justified shackling defendant. Neither the trial court nor counsel explained the basis for the shackling policy or the particular reasons supporting defendant's shackling in this case.

The trial court's shackling policy placed in serious jeopardy defendant's right to a fair trial. The United States Supreme Court explained in *Deck* that visible shackling without cause impugns the integrity of a criminal trial, because it "undermines the presumption of innocence and the related fairness of the factfinding process," diminishes the accused's right to counsel, and "affronts ... the dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* at 630-631 (internal quotation omitted). While no reasonable excuse exists for defense counsel's failure to object to the shackling policy, I believe that the trial court bears equal responsibility for safeguarding the presumption of innocence and the integrity of a criminal trial. Indisputably, the trial court's decision to shackle defendant constituted plain error.

Defense counsel's neglect to object to the shackling contributed to the critical gap in the record concerning the visibility of the shackling and abetted the trial court's denial of defendant's due process rights.¹ "[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664.

Defense counsel's failure to effectively object to the shackling fell below an objective standard of reasonableness. In the absence of any substantiation that defendant posed a security risk to courtroom personnel, I can conceive of no tactical reason for defense counsel's lack of objection to the shackling. Counsel's failure to object also converted this Court's review from the harmless error standard, under which the prosecution bears the burden of proving beyond a reasonable doubt that the shackling did not contribute to the verdict, to that of plain error, under which defendant must demonstrate a reasonable probability that a more favorable result would

¹ Defendant presented to this Court a video record of the trial. As the majority acknowledges, defendant's wrist shackle is clearly visible on the video. The majority observes that "there is no record evidence that the video accurately portrays the view from the position of the jurors." *Ante* at 3. However, because defense counsel failed to object to the shackling, the record before this Court contains no accurate information about the jury's sight lines. Given the record before us, it is simply impossible to determine with any degree of reasonable certainty whether the jurors could observe defendant's shackled wrist. In my view, this Court should refrain from speculation with regard to video camera angles and the location of the jury box.

have obtained had the court not shackled him. Thus, counsel's silence in the face of unjustified shackling affected a "double whammy"; defendant remained shackled and he forfeited stringent appellate review of this due process violation.

The majority concludes that "[g]iven the substantial evidence of defendant's guilt, we conclude that any error in shackling defendant was harmless." *Ante* at 4. Because the error was plain and affected defendant's substantial rights, the proper inquiries about the impact of the shackling become whether it (1) "affected the outcome of the lower court proceedings," and (2) either "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings." *People v Borgne*, 483 Mich 178, 196-197; 768 NW2d 290, reh granted in part 485 Mich 868 (2009). With respect to defense counsel's ineffective assistance, this Court must determine whether, but for counsel's error, a reasonable probability exists that the result of the proceedings would have differed.

Defendant claimed self-defense. He testified that while he drove the victim home, the victim threatened him with a box cutter and swung it into defendant's right arm. Defendant admitted that he grabbed the victim and pushed her back, pinning her against the passenger side of the vehicle, but denied that he intended to hurt her. The pathologist who performed an autopsy on the victim rebutted defendant's testimony by explaining that the victim's neck injury appeared inconsistent "with a broad force placed across" the victim's neck, but consistent with "choking." Forensic testing of the box cutter did not reveal any blood. If visible to the jury, the shackles served to emphasize defendant's violent character and to rebut his claim that he acted in self-defense. However, because the record remains unclear as to whether any jurors saw the shackles, and because substantial evidence supported the jury's rejection of defendant's self-defense claim, he has failed to establish that the shackles affected the outcome of his trial.

On the basis of the same "substantial evidence of defendant's guilt," the majority holds that defendant did not satisfy the prejudice component of the *Strickland* test. *Ante* at 4. In my view, an analysis under *Strickland* yields a closer result. The prosecution alleged that defendant committed a violent crime, while defendant claimed that he protected himself from an attack by the intoxicated victim wielding a box cutter. As this Court observed in *People v Baskin*, 145 Mich App 526, 546; 378 NW2d 535 (1985),² "This is a situation where actions speak louder than words. The mere shackling of the defendant in this case impinged upon defendant's credibility by indicating that defendant was not to be trusted and prejudiced his right to a fair trial." But the record here lacks any evidence tending to affirmatively demonstrate that the jurors saw the shackles. Furthermore, the pathologist's testimony and the physical evidence completely refuted defendant's claim that he merely staved off the victim's attack. Because defendant has not established a reasonable probability that, but for counsel's errors, the result of his trial would have differed, I agree that his conviction should stand affirmed.

/s/ Elizabeth L. Gleicher

² Superseded by statute on other grounds as noted in *People v O'Quinn*, 185 Mich App 40, 44-45; 460 NW2d 264 (1990), overruled in *People v Koonce*, 466 Mich 515, 522-523; 648 NW2d 153 (2002).